IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 14TH SEPTEMBER 2007 / 23RD BHADRA 1929

WP(C).No. 27456 of 2007(R)

AGAINST THE ORDER DATED 16/08/2007 IN IA 1182/2007 IN OS.249/2005 of MUNSIFF COURT, MAVELIKKARA

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PETITIONER:

RADHA UNNITHAN, AGED 51 YEARS,
W/O.LATE GOPALAKRISHNAN UNNITHAN,
KADAKKATHARAYIL VEETTIL, ULAVAKKADU MURIYIL,
PALAMEL VILLAGE.

BY ADV. SRI.R.PADMAKUMAR
SRI.R.T.PRADEEP
SRI.V.VIJULAL

RESPONDENTS:

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1. VISWANATHAN UNNITHAN,
LAL BHAVAN, ULAVAKKADVU MURI,
PALAMEL VILLAGE.

2. AMBILI UNNITHAN, D/O.RADHA UNNITHAN,
KADAKKATHARAYIL VEETTIL, ULAVAKKADU MURIYIL
PALAMEL VILLAGE.

3. ANIL KUMAR,
S/O.LATE GOPALAKRISHNAN UNNITHAN,
RESIDING AT KADAKKATHARAYIL VEETTIL,
ULAVAKKADU MURIYIL, PALAMEL VILLAGE.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 14/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.Krishnan, J.

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W.P(C).No.27456 of 2007

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Dated this the 14th day of September, 2007.

JUDGMENT

This Writ Petition is filed challenging the order of the Munsiff, Mavelikkara in O.S.No.249 of 2005 whereby he allowed an application for amendment of the plaint. The suit is one relating to a pathway and it is seen from paragraph 8 of the plaint that the plaintiff is claiming right by prescription by the long user, openly, uninterruptedly, peaceably and hostile to the owner.

2. It is true that one of the necessary ingredients necessary to constitute easement by prescription is that such user must be as of right. It is not seen pleaded in paragraph 8. There was a temporary injunction application filed and it reached this Court and this Court found that there are lack of pleadings, especially with respect to the plea of as of right. Thereafter, the plaintiff has moved the application for amendment and it has been

allowed by the court.

3. Learned counsel for the writ petitioner submits before me that a party cannot be permitted to fill the lacuna, especially after a finding rendered by this Court and therefore the valid right accrued to him is taken away by allowing the application for amendment. With respect, I am not able to agree with the said proposition for the following reasons. We know that the litigants are not conscious of the ingredients that are to be specifically pleaded in a case. What has to be gathered from the whole pleading is to make the other side understand what is the right, a person is claiming over the property. In this case, the plaintiff has made it clear even in the original plaint that he has claimed right over the property by prescription. When such a claim is made the other side is put into the knowledge as to what is claimed by the plaintiff. It is true that when pleadings are drafted one has to meticulously plea the necessary ingredients to constitute the same. But unfortunately, in this case, the words "as of right" has been omitted to be included. A reading of the plaint in toto would specifically establish the fact that what the plaintiff claims is easement by prescription. The defendants have

been put to the knowledge of the same as well.

4. It is true that this Court while disposing of the Writ Petition against the order of the C.M.A. found out lack of pleading in the form that the words "as of right" have not been pleaded. In a suit of easement, it is a settled principle that it is a right which affects the enjoyment of the property by the real owner of the property and therefore, the law mandates that it must be meticulously scrutinized and decision be taken. So, when it is brought to the knowledge of the defendants, they want to incorporate the words "as of right", which is necessary to constitute proper pleadings. The Apex Court has always taken the view that in the case of amendment of the pleading, there must be liberal approach unless it substantially prejudices the right of the other side. Here instead of attempting to make an interpretation at a later stage whether the entire pleadings taken together constitute the right of easement by prescription now the plaintiff wants to correct it by stating that what he pleads is easement by prescription by including as of right also.

5. Therefore, no valuable right is taken away and therefore I feel that the order is not liable to be interfered with and

therefore, it is dismissed. Needless to say that the easement by prescription is a matter which the plaintiff is bound to prove and the court has to decide it strictly in accordance with law.

Writ Petition is disposed of accordingly.

M.N.Krishnan,
Judge.

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